STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK DAVID BAILEY,

Defendant-Appellant.

UNPUBLISHED
July 26, 2007

No. 265803
Mecosta Circuit Court
LC No. 04-005394-FC

Before: Murphy, P.J., and Zahra and Servitto, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a), and first-degree felony murder, MCL 750.316(1)(b), arising from the February 1989 killing of the victim, 79-year-old Big Rapids resident Mary Pine. The trial court sentenced defendant to life imprisonment without parole for one count of first-degree murder. Defendant appeals as of right. We affirm.

Defendant first contends that the trial court improperly permitted the prosecutor to elicit other acts evidence for the purpose of showing his modus operandi or identity, in contravention of a pretrial ruling that the other acts evidence of defendant's burglaries was admissible only as tending to show his plan, scheme, or system in committing burglaries. This Court reviews for a clear abuse of discretion a trial court's decision whether to admit evidence under MRE 404(b). *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). Where a trial court selects a reasonable and principled outcome from a spectrum of possible principled outcomes, deference is given and the court's decision does not constitute an abuse of discretion. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006) (adopting this standard from *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 [2003], as the default abuse of discretion standard). A trial court's decision on a close evidentiary question ordinarily cannot constitute an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000).

Defendant insists that the trial court's admission of the other acts evidence violates MRE 404(b). Subrule 404(b)(1) prohibits the admission of evidence of a defendant's other acts or crimes when introduced solely for the purpose of proving a defendant's character "to show that the person acted in conformity with character on a particular occasion." *Sabin*, *supra* at 56. But evidence of a defendant's other acts or crimes is admissible under the following circumstances: (1) the prosecutor offers the evidence for a proper purpose under MRE 404(b)(1), including to prove the defendant's scheme, plan, or system in doing an act; (2) the other acts evidence is

admissible as relevant under MRE 401 and 402, as enforced through MRE 104(b); and (3) any unfair prejudice arising from the admission of the other acts evidence does not substantially outweigh its probative value, MRE 403. *Starr*, *supra* at 496; *People v Ackerman*, 257 Mich App 434, 439-440; 669 NW2d 818 (2003).

In satisfaction of the first element of the admissibility test, the prosecutor offered the other acts evidence, and the trial court admitted it, for a proper noncharacter purpose expressly contemplated by MRE 404(b)(1), to illustrate defendant's "scheme, plan, or system in doing an act." In both the prosecutor's pretrial notice of other acts and his amended notice, he identified the proposed theories of admissibility of evidence of defendant's prior burglaries as showing his plan, scheme or system in committing crimes, his identity through modus operandi, and, for felony murder purposes, his intent and motive in entering the victim's house. At the pretrial motion hearing, the court explained that it did not "have a problem with [the residential] burglaries being other acts that go, according to the exception, to plan or scheme."

During closing argument, the prosecutor repeatedly referred to defendant's "MO" or "modus operandi," which he initially defined as "a pattern of criminal behavior so distinct that separate crimes are recognized as the work of the same person." In his pretrial amended notice of other acts evidence, the prosecutor had used interchangeably the terms "MO" and "pattern or scheme." Therefore, it appears that the prosecutor simply may have conflated the pattern, scheme or system purpose under MRE 404(b)(1) with the identity through modus operandi exception.[1] But at no point during closing argument did the prosecutor impermissibly suggest that the jury could consider the other acts evidence as substantive evidence of defendant's guilt. *People v McGhee*, 268 Mich App 600, 635-636; 709 NW2d 595 (2005); *People v Quinn*, 194 Mich App 250, 253; 486 NW2d 139 (1992).

Even assuming that the prosecutor injected error into the proceedings by reiterating during closing argument that the burglaries constituted evidence of defendant's modus operandi, which he had defined as involving signature crimes, at no point during the prosecutor's lengthy argument did defendant raise any objection to his characterization of the other acts evidence as proving "modus operandi." *People v Callon*, 256 Mich App 312, 329-330; 662 NW2d 501 (2003) (explaining that no error requiring reversal exists when a curative instruction, if requested, could have alleviated any prejudicial effect). We conclude that the prosecutor's mischaracterizations of the other acts evidence do not constitute plain, outcome determinative error for the reasons set forth in footnote 1 of this opinion and because the trial court instructed

[1] We note that use of other acts evidence relative to "identity" requires a higher degree of similarity, along with uniqueness and distinctiveness. *Sabin, supra* at 65-66. While the term "modus operandi," which simply means "[a] method of operating or a manner of procedure," Black's Law Dictionary (7th ed), is typically attached to the "identity" purpose under MRE 404(b)(1), *People v Ho*, 231 Mich App 178, 186; 585 NW2d 357 (1998), it is understandable that one can view "scheme, plan, or system in doing an act" as also entailing aspects of the concept of modus operandi. We find it highly unlikely that the jury made any distinction between the prosecutor's reference to scheme, plan, or system relative to the burglaries and the reference to modus operandi relative to the burglaries, such that it had any bearing on the verdict.

the jury that the statements and arguments of the attorneys did not constitute evidence.[2] *Id*. at 329. We note that the trial court never instructed the jury that "modus operandi" had some stronger legal significance, comparable to the law on "identity," beyond showing scheme, plan, or system.

Regarding the second element of the other acts admissibility test, i.e., relevance as defined by MRE 401, the Michigan Supreme Court has explained that

> evidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system. Logical relevance is not limited to circumstances in which the charged and uncharged acts are part of a single continuing conception or plot. [*Sabin, supra* at 63-64 (citation omitted).]

With respect to the killing of the victim in this case and the other acts evidence involving defendant's burglaries from other residences in the mid-1980s, these incidents share several common features. Defendant had obtained jobs mowing lawns for Robert King and Brian and Laurie Kelly, and also had performed yard work for the victim, such as lawn mowing and snow shoveling. Defendant's work at the Kelly and King residences in 1986 and his work for the victim apparently enabled him to become familiar with the comings and goings of the residences' occupants and take advantage of their absences by breaking and entering their unoccupied homes in the daytime. With regard to the victim, defendant told the police that he had shoveled the victim's driveway for free within days of her death, and he later told his former cellmate, Robert Thompson, that on the day of the victim's death, he happened to see her leave the house and took advantage of her absence to break and enter her house during the daytime. During the burglaries, defendant routinely stole change from the residences, except when King's possession of marijuana afforded defendant an opportunity to take drugs. In light of these multiple shared similarities, we find that a jury reasonably could infer that defendant employed a common plan, scheme, or system to achieve his repeated acts of breaking and entering the houses of Kelly, King, and the victim. *Sabin*, *supra* at 66. Stated differently, defendant's courses of conduct in breaking and entering the homes of yard-work employers Kelly, King, and the victim during daylight hours involve more than general similarity, they reflect "*such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations*." *Id*. at 64-65 (emphasis in original), quoting 2 Wigmore, Evidence (Chadbourn rev), § 304, p 249.

Some dissimilarities exist between the evidence that defendant burglarized the Kelly and King residences and that he broke and entered the victim's house on February 15, 1989, primarily that (1) defendant took drugs only from King's house, and (2) in this case defendant repeatedly beat and stabbed the victim, apparently to silence her when she returned home during the burglary, whereas none of his other burglaries involved any violent conduct. "On the basis of th[ese distinctions], one could infer that the uncharged and charged acts involved different modes

[2] Defendant lodged no objections to any of the trial court's instructions.

of acting, both in terms of [criminal] acts and the manner in which defendant allegedly perpetrated the [burglaries]." *Sabin, supra* at 67. In a case involving charged acts and other acts sharing sufficient common features to infer a plan, scheme, or system to do the acts, but that also "were dissimilar in many respects,"[3] the Michigan Supreme Court recommended that appellate courts defer to the trial court's comparison of the evidence:

> This case thus is one in which reasonable persons could disagree on whether the charged and uncharged acts contained sufficient common features to infer the existence of a common system used by defendant in committing the acts. As we have often observed, the trial court's decision on a close evidentiary question such as this one ordinarily cannot be an abuse of discretion. We therefore conclude that the trial court did not abuse its discretion in determining, under the circumstances of this case, that the evidence was admissible under this theory of logical relevance. [*Id.* at 67-68 (citations omitted).]

Because defendant's robberies of the victim, King, and the Kellys shared several close similarities, we cannot conclude that the trial court abused its discretion by admitting the other acts evidence to show defendant's plan, scheme, or system in committing crimes, an expressly sanctioned purpose under MRE 404(b)(1).

Regarding defendant's burglary of Mike's Market on April 3, 1989, we located no trial court ruling on the admissibility of this evidence, which the prosecutor likewise had offered to show defendant's "pattern or scheme ('MO') in . . . gain[ing] familiarity with his intended burglary victims . . . ."[4] Melody Panek's trial testimony substantiated that, within a few weeks of the robbery, she met defendant, who had stopped at the market on a couple of occasions and politely engaged her in conversation. Defendant's robbery of the market was dissimilar from his other burglaries, primarily because the market was not a residential building and because he broke into the market at night. But in light of the evidence that, like the residential robberies of King, the Kellys, and the victim, defendant had visited the market and apparently familiarized himself with it shortly before he robbed it and, like the residential robberies, he entered the market when no one occupied the building, the trial court did not abuse its discretion by admitting evidence of the market break-in as tending to prove defendant's scheme, plan or system in committing robberies. Moreover, assuming error in relation to the burglary of the market, we conclude that it simply did not constitute plain error affecting defendant's substantial rights; the error was harmless as it did not affect the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999).

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[3] The *Sabin* Court stated that "[t]he charged act in this case, in contrast [to the previous acts], was the only time defendant assaulted the complainant." *Sabin, supra* at 67. Here, the charged act also differed in that defendant had not physically assaulted anyone in the previous burglaries.

[4] Given the trial court's final instructions advising the jury to consider the other acts evidence as proving defendant's "plan, system or characteristic scheme," the court presumably found evidence of the market robbery admissible for this purpose.

Because the trial court properly found that the other acts evidence established a scheme, plan, or system of committing burglaries, the other acts evidence tended to make more probable than not that the alleged burglary of the victim leading to the charged premeditated killing in this case in fact occurred. *Sabin*, *supra* at 63. In light of the significant probative value of the other acts evidence, no danger of unfair prejudice inherent in admitting the evidence substantially outweighed its probative value, especially given that the trial court twice cautioned the jury regarding the proper, limited purpose for which it could consider the evidence of other burglaries. *Id*. at 70-71.

II

Defendant next argues that the trial court erred by refusing to admit, pursuant to MRE 803(24), statements that the victim's deceased neighbor, Weston Wood, made to the police. This Court considers de novo legal questions "such as whether [the constitution,] a rule of evidence or statute precludes the admission of the evidence." *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). This Court reviews for an abuse of discretion a trial court's decision whether to grant a motion for reconsideration under MCR 2.119(F). *People v Walters*, 266 Mich App 341, 350; 700 NW2d 424 (2005).

The Michigan Supreme Court recently summarized as follows the elements necessary to establish the residual hearsay exception's applicability:

> [E]vidence offered under MRE 803(24) must satisfy four elements to be admissible: (1) it must have circumstantial guarantees of trustworthiness equal to the categorical exceptions, (2) it must tend to establish a material fact, (3) it must be the most probative evidence on that fact that the offering party could produce through reasonable efforts, and (4) its admission must serve the interests of justice. [*Katt*, *supra* at 279.]

"The first and most important requirement is that the proffered statement have circumstantial guarantees of trustworthiness equivalent to those of the categorical hearsay exceptions," and the "courts should consider the 'totality of the circumstances' surrounding each statement to determine whether equivalent guarantees of trustworthiness exist." *Id*. at 290-291. Factors relevant in determining whether certain statements possess particularized guarantees of trustworthiness include:

> "(1) the spontaneity of the statements, (2) the consistency of the statements, (3) lack of motive to fabricate or lack of bias, (4) the reason the declarant cannot testify, (5) the voluntariness of the statements, i.e., whether they were made in response to leading questions or made under undue influence, (6) personal knowledge of the declarant about the matter on which he spoke, (7) to whom the statements were made, and (8) the time frame within which the statements were made." [*People v Geno*, 261 Mich App 624, 634; 683 NW2d 687 (2004) (citation and ellipsis omitted).]

Defendant urged the trial court to admit several statements that Wood made to the police, which he insisted supported his alibi in light of the evidence that he worked from 3:00 p.m. to 9:00 p.m. on February 15, 1989, considering that, according to Wood, the victim had brought

him the paper around 3:10 p.m. on that date. Defendant maintained that the consistency of the several statements of Wood taken shortly after the victim's killing, all made to the police within days or weeks of the victim's death, together with the absence of any motive for Wood to fabricate the information, demonstrated the reliability of his out-of-court statements. The prosecution countered that Wood's recollections of having seen the victim at around 3:00 p.m. lacked indicia of trustworthiness because he did not sign or otherwise adopt his statements, which the police transcribed, and because during a September 1990 interview with the police Wood denied that he had seen the victim around 3:00 p.m., expressing instead his belief that he had seen the victim around 2:00 p.m.

The admissibility of Wood's statements was decided initially before trial by another judge who did not preside over the jury trial, and the evidence was excluded. Before witness testimony commenced at trial, the trial court addressed the admissibility of Wood's statements in the context of defendant's motion for reconsideration. The trial court offered an extremely detailed analysis concerning the admissibility of Wood's statements. The court thoroughly and thoughtfully addressed the relevant admissibility factors in the factual context of this case. On review of the court's analysis, with which we mostly agree, we cannot conclude that the trial court erred in excluding the evidence or abused its discretion in denying the motion for reconsideration. We also point out that the final statement by Wood on the matter was during a police interview in which:

> Mr. Wood stated that if he previously made a statement that mentioned 3:00 PM or 3:10 PM as the time that Mrs. Pine left his home, that was incorrect. He said that he has no doubt about the time of Mrs. Pine's departure. He said that any variance would have been alerting for him and that she was always dependable with her visits. He emphasized that Mrs. Pine left his home at 2:00 P[M] not 3:00 PM on 2-15-89.

Wood, however, was also emphatic when he made his earlier claims that the time was 3:10 p.m., but then he also had initially told police that it was around 2:00 p.m. This inconsistency draws into question the trustworthiness of the statements. Given the two conflicting versions of events as described by Wood, and considering his final say on the matter, we find that defendant lacks a showing of prejudice with regard to the exclusion of the evidence. Reversal is unwarranted.

III

Defendant next raises several instances of alleged ineffective assistance of counsel. Because defendant failed to challenge his trial counsel's effectiveness in a motion for a new trial or an evidentiary hearing, this Court limits its review of this claim to mistakes apparent on the existing record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

To establish ineffective assistance of counsel, "a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). With respect to the prejudice prong of the test, the defendant must "demonstrate a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *and* the attendant proceedings were fundamentally unfair or

unreliable." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001) (emphasis in original). The defendant must overcome the strong presumptions that his counsel rendered effective assistance and that his counsel's actions represented sound trial strategy. *Rodgers, supra* at 715.

We first conclude that defense counsel was not ineffective with respect to his handling of police officer testimony relating to the tracking of suspect footprints. Detective Richard Miller testified that, after arriving at the victim's house on the evening of February 15, 1989, and during the daylight hours on February 16, 1989, he examined the imprints made by the suspect's footwear, he became familiar with the pattern on the bottom of the suspect's footwear, and, while attempting to trace the route the suspect walked as well as locate other tracks similar to the suspect's, he carried a scaled photograph of the suspect's footprint. Miller recalled that on February 16, 1989, he went to the gravel pit where the victim's car was concealed, and that the footprints he saw going from the car "seemed to correspond to the foot tracks that we tracked outside of [the victim's] house . . . ." Miller also described that on February 17 or 18, 1989, he saw outside an Oak Street apartment tracks that looked larger than the suspect's footprints but had "tread wear [that] appeared quite similar." Because Miller hoped to learn what type of footwear made the impressions, he spoke with college student Douglas Chapman and examined his Nike tennis shoes, which had "a cut or mark on the heel of the shoe, which was totally different than the track we had associated with the homicide scene," and they were larger than the suspect's shoes.

To the extent that defense counsel did not timely object to Miller's testimony that the suspect's footprint trail to the victim's house seemed similar to the footprints found at the gravel pit and that Chapman's footprints appeared larger than the suspect's, any objection was futile. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005). Because Miller explained on the record that he premised his opinions on his own perceptions of the suspect's footprints, a photograph of the suspect's footprints, and an inspection of Chapman's shoes, and because his opinions were "helpful to a clear understanding of his testimony" regarding the course of his investigation, the trial court properly admitted Miller's testimony under MRE 701. See *Co-Jo, Inc v Strand*, 226 Mich App 108, 117; 572 NW2d 251 (1997) (fireman's testimony and observations regarding the speed and intensity of a fire were properly admitted under MRE 701 without necessity of expert qualifications where testimony was general in nature without reference to technical comparisons or scientific analysis).

Defense counsel lodged no objection to Detective George Pratt's similar testimony that he observed the suspect's footprints outside the victim's house on February 16, 1989, that he familiarized himself with the footprints, that outside defendant's address in the early morning hours of February 16, 1989, Pratt found "an impression in ice that appeared to contain the same pattern as the shoe print that I saw . . . behind [the victim's] home," and that he later observed near the victim's abandoned car "footwear impressions . . . similar to the impressions that [he] saw behind Mary Pine's home and also the type that appeared" outside defendant's address. But because Pratt likewise explained that he had based his opinions regarding footprint similarity on his own perceptions, his testimony also qualifies as admissible pursuant to MRE 701, and any objection would have been meritless.

Defendant's contention that his counsel provided ineffective assistance by not securing the presence of footwear experts to testify at trial also lacks merit. First, our review of the trial

transcripts reflects that defendant affirmatively expressed his concurrence in the prosecutor's and defense counsel's agreement to admit footwear analysis reports by E. H. Frederick, Ph.D., and the FBI, in lieu of calling Frederick and the FBI author as witnesses; defendant's agreement arguably waived and extinguished any claim of error. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000). Regardless, decisions regarding what witnesses and evidence to present at trial involve matters of trial strategy, which this Court generally will not second-guess, and defense counsel's decision to introduce the reports of Frederick and the FBI, and to cross-examine prosecution footwear expert Gary Truszkowski regarding the basis for his opinions concerning the conclusions of these reports, falls within the range of reasonable trial strategy. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).[5]

Lastly, defense counsel was not ineffective on the basis that he failed to request the cautionary dog tracking instruction, CJI2d 4.14. Two former state police dog handlers testified that they brought tracking dogs to the scene of the victim's murder on the evening of February 15, 1989; that their dogs were incapable of backtracking the suspect's footprints from the alley behind the victim's house toward their origin; that the dogs detected no track leading away from the victim's house, only a scent from the small distance between the victim's house, which had been contaminated with the scents of multiple officers, to an area near the front of the victim's garage; and that therefore, shortly after arriving, they put the dogs away. Because the evidence did not support a request by defense counsel for the cautionary instruction regarding dog tracking, counsel was not ineffective for failing to urge the trial court to read CJI2d 4.14. *Mack, supra* at 130.

IV

Defendant additionally asserts that the trial court's refusal to admit evidence of an unsolved 1980 Big Rapids killing, similar to the instant victim's killing, denied him his constitutional right to present a defense. "A criminal defendant has a state and federal constitutional right to present a defense." *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002), citing US Const, Ams VI, XIV; Const 1963, art 1, § 13.

Defendant sought to introduce evidence of the 1980 murder of 90-year-old Big Rapids resident Stella Lintenmuth, which he maintained had many similarities to the charged killing of the victim in this case. Defendant reasoned that, in light of the killings' similarities, a reasonable inference existed that one person committed both crimes, and that he could not have committed them because in 1980 he was only ten years of age. At the pretrial motion hearing on June 9, 2005, the court concluded briefly that "regarding another murder of an elderly person when the defendant would have been about 10 years old, that is not to be brought before the jury."

In support of defendant's contention that one person must have killed both Lintenmuth and the victim, he offered an April 4, 1989, profile by the Michigan State Police and a May 31, 1990, FBI "crime analysis." The state police profile notes that there are "several similarities"

[5] Defense counsel elicited Truszkowski's concession that neither he, Frederick, nor the FBI author could "identify [defendant's] particular shoes as what made the impressions."

between the 1980 death of Lintenmuth and the 1989 killing of the victim, but the report does not provide any specifics. The FBI report documents and details multiple similarities between the victims' characteristics and deaths.

The issue of defense evidence of third-party guilt was addressed in *Holmes v South Carolina*, 547 US 319; 126 S Ct 1727; 164 L Ed 2d 503 (2006). The United States Supreme Court indicated that evidence tending to show that a person other than the defendant committed the charged crime may be introduced by the defendant when it is inconsistent with, and raises a reasonable doubt of, the defendant's guilt. *Id.* at 1733. The evidence should be excluded, however, when it is too remote, when it lacks a connection with the charged crime, when it can have no other effect than to cast a bare suspicion upon another, or when it raises merely a conjectural inference that another person committed the crime. *Id.*

In *People v Kent*, 157 Mich App 780, 793; 404 NW2d 668 (1987), this Court stated that "evidence tending to incriminate another is admissible if it is competent and confined to substantive facts which create more than a mere suspicion that another was the perpetrator."

Here, defendant is not relying on any direct evidence that another person committed the murder, e.g., someone else was seen driving the victim's car after the killing, someone else was seen entering the home, or someone else made an inculpatory statement. Rather, defendant is arguing that the 1980 murder indirectly shows that someone else committed the charged murder because the same perpetrator necessarily had to be involved in both killings, given the similarities between the crimes. While it may be arguable on some level, we find no abuse of discretion with respect to the trial court's evidentiary ruling. Under the circumstances presented, and considering the similarities between the crimes as well as the differences, a reasonable and principled decision would include one that finds nothing more than the creation of mere suspicion, a conjectural inference, excessive remoteness, or an inadequate connection. Accordingly, reversal is unwarranted.

V

Defendant lastly maintains that the trial court infringed on his rights to counsel and to present a defense when it curtailed the scope of defense counsel's closing argument. Pursuant to MCL 768.29, a "trial court has broad discretion in regard to controlling trial proceedings," including counsel's arguments and the parties' introduction of evidence. *People v Taylor*, 252 Mich App 519, 522; 652 NW2d 526 (2002). Because defendant did not object to the trial court's ruling limiting closing argument, we consider this issue only to determine whether a plain error occurred that affected defendant's substantial rights. *Carines*, *supra* at 763-764.

When the prosecutor proposed a rebuttal character witness, the trial court correctly observed that defendant had injected the issue of his propensity for peaceful behavior, thus opening the door to evidence of his propensity for violence. Defense counsel had questioned the Kellys, King, and Michael Monica, defendant's burglary accomplice, regarding whether defendant ever had exhibited any aggressive, angry, or violent behavior, including when confronted with allegations of burglary. Nonetheless, the trial court, apparently referring to MRE 403, precluded the prosecutor from presenting rebuttal character testimony regarding a 1991 or 1992 sexual assault by defendant, which the trial court viewed as more prejudicial than probative. The trial court explained that, rather than permit the defense to emphasize inaccurate

character evidence, it deemed it fair to impose the narrow prohibition on the defense that it could not mention during closing argument that defendant never had behaved aggressively toward his prior victims.

Because the trial court has broad discretion to control trial proceedings, and because the trial court weighed competing considerations of fairness, specifically defendant's interest in precluding relevant but unfairly prejudicial rebuttal evidence and the prosecutor's interest in undercutting the inaccurate character testimony elicited by defendant, we conclude that the trial court did not abuse its discretion when it imposed the closing argument restriction. *Taylor*, *supra* at 522.

Even assuming that the limitation constitutes plain error, it did not affect the outcome of defendant's trial because the jury already had heard four witnesses testify concerning defendant's nonconfrontational behavior, defense counsel successfully addressed during his closing argument that defendant's "MO" involved robbing places when he "was certain nobody would be home" and that he took only "[p]op cans and minor change," defense counsel otherwise argued at length in attacking the prosecutor's evidence, and because substantial properly admitted evidence reasonably supported the jury's finding that defendant killed the victim. *Carines*, *supra* at 763-764.

Affirmed.

/s/ William B. Murphy
/s/ Brian K. Zahra
/s/ Deborah A. Servitto